

**Teamsters Local 79 (Carl Subler Trucking, Inc.) and
Robert Cummings. Case 10-CB-3899**

23 April 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS
HUNTER AND DENNIS

On 5 August 1983 Administrative Law Judge Lawrence W. Cullen issued the attached decision. The Respondent filed exceptions and a supporting brief.¹

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,² and conclusions³ and to adopt the recommended Order.

The judge concluded that the Respondent threatened employee Cummins with unspecified reprisals for engaging in protected intraunion activities in

violation of Section 8(b)(1)(A) of the Act when Business Agent Dennis Fernandez told Cummins in a March 1982 telephone conversation, "I can be your friend, you know, but don't cross me." We find merit in the Respondent's exceptions to the judge's conclusion.

The conversation in question was initiated by Cummins, who was then a union steward, in an attempt to resolve a grievance that he, as an employee, has against the Employer. Immediately after Cummins related the grievance to Fernandez, Fernandez contacted the Employer and resolved the grievance favorably to Cummins. In testimony credited by the judge, Cummins stated that after the grievance was resolved, "as an afterthought or whatever, [Fernandez] said, 'by the way, I've got a bone to pick with you,' and then he proceeded to tell me that there was a lot of scuttle-butt out there that I was saying some bad things about the Union Hall and everything." Cummins testified that he told Fernandez that if he had something to say to Fernandez he would say it to him personally, and that Fernandez then said, "I can be your friend, you know, but don't cross me." Cummins asked whether what Fernandez had said was a threat, and Fernandez replied in the negative. Later in his testimony about the same conversation, Cummins stated that Fernandez "had indicated that I was inciting the drivers against the Union and so forth and against the . . . grievance procedure . . . and stirring them up against the Union." Cummins further testified that he did not think the conversation was "all that important."

Considering the circumstances presented here, including particularly that Cummins was a union steward, that the "don't cross me" remark was made after Fernandez had successfully resolved a grievance in Cummins' favor, and the ambiguous and vague nature of the remark, we conclude that it did not constitute a threat of reprisal violative of the Act. Accordingly, we shall dismiss that portion of the complaint.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Teamsters Local 79, Tampa, Florida, its officers, agents, and representatives, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(a).

"(a) Attempting to cause the Employer, Carl Subler Trucking Company, to discriminate against Robert Cummings in his terms and conditions of employment because of his participation in protected intraunion activities."

¹ The Respondent has excepted to the failure of the judge to consider the posthearing brief which the Respondent attempted to file with the judge and to the denial of the Respondent's request for an extension of time in which to file such a brief. At the hearing the judge set 27 July 1983 as the deadline for filing posthearing briefs. On 26 July the Respondent for the first time requested an extension of time in which to file its briefs. The request was denied. The Respondent then filed a brief dated 27 July which was not received in the office of the judge until 29 July. Sec. 102.42 of the Board's Rules and Regulations provides that no request for an extension of time in which to file a posthearing brief "will be considered unless received at least 3 days prior to the expiration of the time fixed for the filing of briefs." In these circumstances, the Respondent's request for an extension of time was properly denied and the judge's failure to consider the Respondent's late filed brief was proper.

² The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

³ In adopting the judge's conclusion that the Respondent violated Sec. 8(b)(1)(A) of the Act by removing Cummins from his position as steward, we rely additionally on the fact that there was a delay of more than 6 weeks between the time when, according to the Respondent, its agent, Dennis Fernandez, was supposed to remove Cummins and the time when Fernandez actually wrote the letter of removal. The Respondent's only explanation for the delay was that Fernandez "forgot." The implausibility of forgetting a previously determined removal action for a period of 6 weeks belies the Respondent's argument that its reason for removing Cummins was his disruptive conduct at negotiations and strengthens the inference that the true reason was the Respondent's receipt of the unfair labor practice charge that Cummins filed in the instant case. In adopting the finding of a violation with respect to Cummins' removal as steward, we additionally note that the unfair labor practice charge which Cummins filed against the Respondent involved, inter alia, allegations that the Respondent had violated Cummins' rights as an employee as well as allegations that the Respondent had violated rights of other employees.

In adopting the judge's finding that the Respondent violated the Act by removing Cummins as steward, we do not rely on *Teamsters Local 528 (Theatres Service)*, 237 NLRB 258 (1978), where the Board found that the respondent union violated Sec. 8(b)(1)(A) of the Act by refusing to reinstate an employee as alternative steward because he had filed a charge with the Equal Employment Opportunity Commission.

2. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO MEMBERS POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT attempt to cause the Employer of Robert Cummins, Carl Subler Trucking Company, to discriminate against him in violation of Section 8(a)(3) of the Act.

WE WILL NOT remove Robert Cummins from his position as union steward because he filed an unfair labor practice charge with the National Labor Relations Board.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL immediately reinstate Robert Cummins to his former position of union steward with all rights and privileges previously enjoyed in such positions or, if that position no longer exists, then to a substantially equivalent position.

TEAMSTERS LOCAL 79

DECISION

STATEMENT OF THE CASE

LAWRENCE W. CULLEN, Administrative Law Judge. This case was heard at Atlanta, Georgia, on June 22, 1983. The hearing was held pursuant to an amended complaint issued by the Regional Director for Region 10 of the National Labor Relations Board (the Board) on February 18, 1983, and is based on a second amended charge filed on November 2, 1982. The complaint alleges that Teamsters Local 79 (the Respondent or the Union) violated Section 8(b)(1)(A) and 8(b)(2) of the National Labor Relations Act (the Act) by threatening Robert Cummins, an employee of Carl Subler Trucking, Inc. (the Employer) and a member of the Union, with reprisals if he "engaged in dissent Union and protected, concerted activities" and by removing Robert Cummins as a union steward because he filed a charge against Respondent Union with the Board and by attempting "to cause the Employer to discriminate against its employee Robert Cummins," "because of his membership in, and dissent activities on behalf of, Respondent Union." The complaint is joined by the answer of Respondent wherein it denies the commission of the alleged violations of the Act.

On the entire record in this proceeding including my observation of the witnesses who testified herein, and

after due consideration of the positions of the parties as expressed at the hearing and the brief filed by the General Counsel, I make the following

FINDINGS OF FACT AND ANALYSIS

I. JURISDICTION

A. The Business of the Employer

The complaint alleges, Respondent Teamsters Local 79 admits, and I find that at all times material herein Carl Subler Trucking, Inc. (the Employer) is and has been a Florida corporation with an office and place of business at Conley, Georgia, where it is engaged in the interstate transportation of freight, and that during the past calendar year, a representative period, the Employer derived gross revenues in excess of \$50,000 from the interstate transportation of freight. The complaint further alleges, Respondent admits, and I find that, at all times material herein, Carl Subler Trucking, Inc. is and has been an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

B. The Labor Organization

The complaint alleges, Respondent admits, and I find that, at all times material herein, Teamsters Local 79 is and has been a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

The Employer is a trucking concern within terminals located in various locations in the United States. The Union represents the Employer's truckdrivers. The Charging Party, Robert Cummins, is a member of the Union and was employed by the Employer as a truckdriver at its terminal in Conley, Georgia, where he was also elected as union steward. As a union steward Cummins participated in grievance meetings and negotiations for a new collective-bargaining agreement which were held in 1982. During the course of the 1982 contract negotiations the Employer and the Union were involved in negotiating contractual concessions to the Employer. Contractual concessions had been negotiated by the Employer the previous year. Cummins was opposed to these concessions and voiced his opposition thereto in the 1982 negotiations and prepared and caused a flyer in opposition thereto to be distributed at the Conley facility among the employees.

B. The March 1982 Telephone Conversation Between Robert Cummins and Union Business Agent Dennis Fernandez¹

Cummins testified that on March 5, 1982, he contacted Dennis Fernandez concerning a problem wherein the

¹ In March 1982 Manuel Fernandez (the father of Dennis Fernandez) was president of the Union and Robert H. Meeks was secretary-treasurer of the Union. On June 30, 1982, Manuel Fernandez retired from his position.
Continued

Employer had dispatched Cummins to a location in a manner which Cummins considered to be in violation of the labor agreement. Fernandez resolved the problem and then told Cummins, "I've got a bone to pick with you"; he then told Cummins that he (Dennis Fernandez) has learned "that there was a lot of scuttle-butt out that I [Cummins] was saying some bad things about the Union Hall and everything." Cummins testified he told Dennis Fernandez that if he (Cummins) had something to say to him, he would say it to him personally. Cummins testified that Dennis Fernandez then told him, "'I can be your friend, you know, but don't cross me.' And I [Cummins] said, 'Is that a threat?' And he [Dennis Fernandez] said, 'No, I'm just telling you.'" Cummins testified that Dennis Fernandez had told him that he had learned that Cummins was stirring the drivers up against the Union.

Dennis Fernandez was called by the Respondent Union and acknowledged the conversation and that he had told Cummins he had a bone to pick with him and testified that he thought they (Cummins and Dennis Fernandez) could "get along a lot better and work a lot better together if we cooperate a little bit. I really don't recall saying anything about don't cross me or—I don't recall saying that."

Analysis

I credit the testimony of Cummins as set out above. I found Cummins to be a credible witness who testified with specific recall of the details of this telephone conversation. I also found the lack of recall of Fernandez to be less than a specific denial that he had made the statement attributed to him by Cummins. I do not regard the lack of mention of this incident by Cummins in a prior affidavit as sufficient reason to discredit his testimony.

I accordingly find that Fernandez did make the statement as set out above to Cummins on March 5, 1982, in response to Cummins' participation in intraunion activities. I find that this statement was an unspecified threat of reprisal and that the Respondent Union thereby violated Section 8(b)(1)(A) of the Act.

C. The Alleged June 1982 Discussion of Cummins by Union President Manuel Fernandez with the Employer's Vice President

David Bradley a former driver representative for the Employer and a former business agent for the Union testified that, while he was serving as the Employer's representative during a break in a negotiation session, in June 1982 Robert Cummins was discussed by Ralph (Bud) Scoles, the Employer's vice president of personnel and risk control and Union President Manuel Fernandez and that both men were upset with Cummins because he was causing the Employer and the Union difficulties and im-

pending contract negotiations. Bradley testified that Manuel Fernandez stated "that if they [the Employer] could get something on him, he would see that it would stick." Bradley was laid off by the Employer June 1982 shortly after the ratification of the 1982 labor agreement. On cross-examination Bradley acknowledged that he had resigned from his former position with the Union because he was dissatisfied with the way that Manuel Fernandez had handled the Union's relationship with the Employer and because of expense money problems.

Manuel Fernandez was not called to testify. Dennis Fernandez testified that he had heard a conversation between the Employer's representatives and Manuel Fernandez in early June 1982 concerning Cummins and that the Employer was upset with Cummins and told Dennis and Manuel Fernandez that it intended to discharge Cummins and that Dennis and Manuel Fernandez told the Employer's representatives (Bud Scoles and others) that if they discharged Cummins, they had "better make sure that you get him right, because if you don't, we're gonna stick him up your ass." Dennis Fernandez denied that Manuel Fernandez had ever made a statement that if the Employer were able to get something on Cummins that he would see that it stuck. Dennis Fernandez conceded on cross-examination that he was not present with his father (Manuel Fernandez) throughout the entire negotiations. Bradley was recalled by the General Counsel in rebuttal and testified that, approximately 2 nights after he overheard the conversation between Scoles and Manuel Fernandez as set out above, he was called by Scoles who asked whether Manuel Fernandez could be trusted. Bradley testified he replied in the affirmative and was then ordered by Scoles to engage in surveillance of Cummins in order to get something on him and that he (Bradley) was then flown to Cincinnati, Ohio, and engaged in surveillance of Cummins for a 2-week period, but was unable to find a cause for the discharge of Cummins.

Analysis

The General Counsel contends that the Respondent Union by the statement made by Manuel Fernandez, as set out above, attempted to cause the Employer to discriminate against its employee Robert Cummins.

I credit the testimony of Bradley as set out above. Initially, I recognize that he left his paid union position as business representative because of a dispute with Manuel Fernandez and that he was laid off by the Employer in July 1982 after the ratification of the labor agreement. I, however, found him to be a credible witness whose testimony was straightforward and sincere and I find it unlikely that his testimony is contrived. Moreover, his testimony was not rebutted by either Manuel Fernandez or Scoles, the two participants in the conversation as neither was called to testify. I also note that Dennis Fernandez acknowledged that he was not with his father, Manuel Fernandez, throughout the entire negotiations and that there were more than one conversation concerning Cummins. Under these circumstances I find the testimony of Bradley should be credited. I thus find that Respondent Union violated Section 8(b)(1)(A) and (2) of

tion as president of the Union and Robert H. Meeks was appointed president effective July 1, 1982, and Dennis Fernandez was appointed secretary-treasurer effective July 1, 1982. I find on the basis of the admissions in the answer of Respondent and the testimony of Dennis Fernandez and Meeks at the hearing concerning the responsibilities of Manuel and Dennis Fernandez and of Meeks in their respective positions that Manuel Fernandez was at least from March to June 30, 1982, and that Dennis Fernandez and Meeks were, at all times material herein, agents of the Union within the meaning of Sec. 2(13) of the Act.

the Act by the statement made by Manuel Fernandez to the Employer's representatives that the Union would assist the Employer in upholding adverse action against Cummins (a discharge) if the Employer were to obtain a reason to discharge him. This assurance by the Union to the Employer in the face of the Employer's announced intent to terminate Cummins because of his actions in opposing the course of contract negotiations was clearly an effort to encourage the Employer to take discriminatory action against Cummins in violation of Section 8(a)(3) of the Act because of his participation in protected activities and a violation of Section 8(b)(1)(A) and (2) of the Act. *Fruin-Colnon Corp.*, 227 NLRB 59 (1976), enfd. 571 F.2d 1017 (8th Cir. 1978); *H. H. Robertson Co.*, 263 NLRB 1344 (1982); *Hotel Employees Local 332 (Ogden Food Service)*, 259 NLRB 252 (1981).

D. The Removal of Cummins as a Union Steward in August 1982

The initial charge in this case was filed on August 16, 1982, by Robert Cummins and was received by the Union on August 18, 1982 (G.C. Exh. 1(b)). By his letter of the same date (G.C. Exh. 4) Dennis Fernandez removed Cummins from his position as union steward. Meeks and Dennis Fernandez contended at the hearing that Cummins was to have been removed as stewards in accordance with a mutual directive previously given to Dennis Fernandez by Manuel Fernandez and Robert Meeks as a result of the disruptive conduct of Cummins at contract negotiation sessions. Dennis Fernandez testified that they (union representatives) had hesitated to remove Cummins until contract negotiations were concluded. Meeks testified concerning an incident wherein Cummins allegedly walked out on a negotiating session and sat in a tavern across the street for the remainder of the afternoon. Meeks testified that at a negotiating meeting held in early 1982 he chastised Cummins for openly opposing the Union's position in a bargaining session in the presence of the Employer's representatives rather than presenting a united front and having discussed differences in an intraunion caucus. Fernandez testified that on the afternoon of August 17, 1982, he was directed by Meeks to prepare a letter removing Cummins as steward, that he did so, and left it for the Union's secretary to type who sent it out and signed it on his behalf on August 18, 1982, and that the letter to Cummins apparently went out in the same mail in which the charge was received by the Union on August 18, 1982. Both Dennis Fernandez and Meeks denied that they had any knowledge of the filing of a charge with the Board by Cummins prior to his removal as union steward.

Cummins acknowledged that he had become upset and walked out in a grievance meeting held in January 1981 but denied having ever walked out on a negotiation session. He further acknowledged that Meeks had chastised the entire group of union stewards and representatives for having engaged in simultaneous discussions at a bargaining sessions but denied that he was ever singled out or told that his conduct at bargaining sessions was improper. He further testified he only initially became aware of his removal as steward when he was apprised of it by a notice on a bulletin board at another terminal

in Versailles, Ohio. He was subsequently given a copy of the notice by another union steward.

Analysis

I find that the circumstances as set out above, including the timing of the removal of Cummins as a union steward on the same date the Union received notice that an unfair labor practice charge had been filed with the Board and the un rebutted testimony of Cummins that he had not been previously informed or given any indication of the impending move to remove him as steward by the union representatives, give rise to an inference that he was removed as a union steward because he filed an unfair labor practice charge with the Board. I also credit Cummins' version of his conduct at the negotiating session. I thus find that the General Counsel has made a prima facie case of a violation of the Act.

I further find that the Union's attempt to rebut this inference has failed as I find the testimony of Meeks and Dennis Fernandez implausible with respect to their explanation concerning the timing of the letter of removal on the same date as their receipt of the notice and copy of the unfair labor practice charge. I thus do not credit their explanation and I find that the Respondent Union has failed to rebut the prima facie case. Accordingly, I find that the Respondent Union violated Section 8(b)(1)(A) of the Act by removing Cummins from his position as a union steward because he filed an unfair labor practice charge against the Union. *Teamsters Local 528 (Theatres Service Co.)*, 237 NLRB 258 (1978); *Automobile Workers Local 212 (Chrysler Corp.)*, 257 NLRB 637 (1981), enfd. 690 F.2d 82 (6th Cir. 1982).

III. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III above, occurring in connection with the operations of the Employer described in section I above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

CONCLUSIONS OF LAW

1. The Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Respondent Union is a labor organization within the meaning of Section 2(5) of the Act.
3. By issuing a threat to Robert Cummins the Respondent Union violated Section 8(b)(1)(A) of the Act.
4. By attempting to cause the Employer to discriminate against its employee Robert Cummins because of his participation in protected intraunion activities, the Union violated Section 8(b)(1)(A) and (2) of the Act.
5. By removing Robert Cummins from his position as union steward because he filed an unfair labor practice charge with the Board, the Union violated Section 8(b)(1)(A) of the Act.
6. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices in violation of Section 8(b)(1)(A) and (2) of the Act, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative actions designed to effectuate the policies of the Act.

I recommend that Respondent be ordered to cease and desist from issuing threats to Robert Cummins or from attempting to cause the Employer to discriminate against him because of his participation in protected intraunion activities. I also recommend that Respondent be ordered to reinstate Robert Cummins to his former position as union steward at the Employer's Conley, Georgia terminal, or if that position no longer exists, then to a substantially equivalent position.

On these findings of fact and conclusions of law and on the entire record, I hereby issue the following recommended²

ORDER

The Respondent Teamsters Local 79, Tampa, Florida, its officers, agents, and representatives, shall*

1. Cease and desist from

(a) Threatening Robert Cummins with reprisals or attempting to coerce the Employer, Carl Subler Trucking Company, to discriminate against Robert Cummins in his

² If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

terms and conditions of employment because of his participation in protected intraunion activities.

(b) Removing Robert Cummins from his position as union steward because he has filed an unfair labor practice charge with the National Labor Relations Board.

(c) In any like or related manner restraining or coercing employees in the exercise of the rights under the National Labor Relations Act.

2. Take the following affirmative action designed to effectuate the policies of the Act.

(a) Offer to reinstate Robert Cummins to his former position as union steward with all rights and privileges previously enjoyed, or to a substantially equivalent position if his former position no longer exists.

(b) Post at its business copies of the attached notice marked "Appendix."³ Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to its members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps Respondent has taken to comply.

³ If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."